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June 1, 2012

**Via Email**

National Freedom of Information Office  
US EPA  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
[hq.foia@epa.gov](mailto:hq.foia@epa.gov)

Re: Request Number 08-FOI-00114-12 -  
Appeal of Denial of Fee Waiver Request

Dear Sir or Madam:

This letter constitutes an appeal of the denial of this firm's fee waiver request, on behalf of Encana Oil & Gas (USA) Inc. ("Encana"), in connection with consolidated FOIA Request Number 08-FOI-00114-12. For the following reasons, EPA's determination to deny this fee waiver request should be reversed.

**I. BACKGROUND**

On December 8, 2011, EPA Region 8 and EPA's Office of Research and Development ("ORD") issued a draft report entitled, "Investigation of Ground Water Contamination near Pavillion, Wyoming" ("Draft Report").<sup>1</sup> The Draft Report summarizes and evaluates the results of four rounds of groundwater monitoring in the area of historic and ongoing oil and gas production known as "Pavillion Field," approximately two miles east of the town of Pavillion,

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<sup>1</sup> The Draft Report, which is voluminous, is incorporated by reference as relevant to this appeal. It is assumed for purposes of its consideration of this appeal that the Draft Report is available to EPA. Other administrative record documentation referenced in this submittal is also incorporated by reference and presumably is available to EPA.

Wyoming. The Draft Report concludes that gas production activities, including hydraulic fracturing in Pavillion Field, have contaminated ground water and likely enhanced gas migration at and below depths used for domestic water supply. Draft Report, p. 39.

On December 14, 2011, EPA noticed in the Federal Register a 45-day comment period on the Draft Report. 76 Fed. Reg. 77829. On March 29, 2012, EPA extended the comment period on the Draft Report until October 16, 2012. 77 Fed. Reg. 19012. On January 17, 2012, EPA published a Federal Register notice of its intent to convene a peer review panel to review the Draft Report. 77 Fed. Reg. 2292. The peer review of the Draft Report has now been deferred until after the October 16, 2012 public comment deadline, so that the peer review panel can have the benefit of the public comments received. 77 Fed. Reg. 19012. For purposes of peer review, the Draft Report thus far has been designated as an “Influential Scientific Information.”<sup>2</sup> EPA has also committed to an external peer review meeting in Wyoming, at which the public may provide comment. See Attachment 2, January [date illegible], 2012 letter from EPA Administrator Lisa P. Jackson to Governor Matthew H. Mead of Wyoming.

Encana is the current operator of the Pavillion Field. Encana acquired the field from Tom Brown, Inc. in 2004. Encana has drilled five of the 169 production wells in Pavillion Field since taking over operations on January 1, 2005. Encana’s last hydraulic fracturing application in Pavillion Field occurred in 2007.

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<sup>2</sup> EPA has also stated and, elsewhere, suggested that the peer review of the Draft Report would be designated as a “Highly Influential Scientific Assessment.” See, e.g., Attachment 1, February 14, 2012 letter from EPA Assistant Administrator Paul T. Anastas to Jeff E. Wojahn, President, Encana Oil & Gas (USA) Inc. If the Pavillion Field peer review has been or is designated a Highly Influential Scientific Assessment, EPA would also have to respond in writing to the peer review panel report and make the Agency’s response publicly available.

Encana submitted four FOIA requests to EPA in December 2011, after the Draft Report was released. Separate requests were sent to EPA Region 8, ORD, EPA Region 3 (which performed laboratory analyses) and the Robert S. Kerr Environmental Research Center (which also performed laboratory analysis). Attachments 3-6. Each FOIA request authorized EPA to incur up to \$250 in responding to the request and asked that EPA contact this firm before proceeding, if the cost to respond was likely to exceed that amount.

The FOIA requests essentially sought four categories of information related to the Draft Report and EPA's Phase 1-4 data collection efforts in Pavillion Field:

- (1) information related to EPA's field activities and procedures;
- (2) information related to EPA's laboratory analysis and data generation;
- (3) information related to EPA's evaluation of the information and data generated and considered; and
- (4) EPA intra-agency communications and EPA's communications with third parties related to its Pavillion Field investigations and the Draft Report.

Categories 1-3 are important to understanding EPA's activities and operations in Pavillion Field because the Draft Report focuses on EPA's Phase 3 and 4 data collection efforts and presents the data and other information considered by EPA in only summary fashion. The same is true for the earlier reports covering EPA's Phase 1 and 2 data collection activities.<sup>3</sup>

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<sup>3</sup> URS Operating Services, Inc. "Site Inspection – Analytical Results Report, Pavillion Area Groundwater Investigation Site, Pavillion, Fremont County, Wyoming" (August 2009) (Phase 1 Report); URS Operating

Category 4 is important for similar reasons. The intra-agency communications would further illuminate EPA's approach to Pavillion Field and problems encountered and EPA's decision-making in planning and implementing its technical studies. The communications with third parties are important for multiple reasons: to secure the information on the complaints about the palatability of Pavillion Field ground water that EPA claims was the reason it undertook its Pavillion Field investigation, see, e.g., Draft Report, p. xi;<sup>4</sup> to secure the information related to the external reviews of the Draft Report commissioned by EPA, see Draft Report, p. iv; and to understand which, if any, interest groups were communicating with EPA and, if so, about what, related to EPA's Pavillion Field investigation.

From December 2011 into mid-February 2012, Encana worked with EPA to streamline and narrow the scope of requests to address EPA's concern about the "massive" amount of information involved.<sup>5</sup> At that point, EPA consolidated the four FOIA requests ("Encana's Consolidated FOIA Request"), under a Region 8 lead, and confirmed that EPA's processing of the requests was sufficiently complete to finally provide the cost estimate and timeframe for processing Encana's Consolidated FOIA Request. The announced cost and the timeframe were,

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Services, Inc. "Expanded Site Investigation – Analytical Results Report, Pavillion Area Groundwater Investigation" (August 30, 2010) (Phase 2 Report).

<sup>4</sup> To date, the information EPA has provided documenting Pavillion Field resident palatability concerns suggests the complaints are few and unsubstantiated. See below at pp. 13-14. Presumably EPA has more information in this regard, to justify an undertaking of the size and scope of EPA's Pavillion Field activities.

<sup>5</sup> This concern about the "massive search" required to respond to Encana's FOIA requests is mystifying. Certainly, Encana anticipated that the field documentation and laboratory back-up would be voluminous for four rounds of sampling, as it should be. But, these types of materials are routinely generated and should be readily accessible. To the extent EPA's complaint was about a "massive" number of communications, this only raises more questions as to whether EPA's agenda in Pavillion Field was driven by technical and scientific considerations or by other factors, as discussed below at pp. 23-24.

quite simply, stunning. EPA demanded pre-payment of \$114,360<sup>6</sup> and estimated it would take EPA six months from receipt of payment to provide a complete response to Encana's Consolidated FOIA Request. Attachment 7, February 16, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, Temkin Wielga & Hardt, LLP ("TWH").<sup>7</sup> The February 16 letter ignored this firm's February 8 request for a fee waiver, pursuant to 40 C.F.R. § 2.107(1), on behalf of Encana. By this point, it had become clear, in light of events in the two months since Encana initially submitted its FOIA requests, that the information being sought "is essential to meaningful public comment and a meaningful peer review and clearly satisfies the other criteria for a public interest fee waiver." Attachment 9, February 8, 2012 letter from Linnea Brown, TWH to Michelle Marcu, EPA Region 8.<sup>8</sup>

On March 27, 2012, Encana paid the \$114,360 demanded by EPA, in light of EPA's refusal to meet to discuss the fee issue and EPA's threat to close the file and not process Encana's Consolidated FOIA Request. Encana felt additional pressure to move the process along given the new, October 2012 deadline for public comments and the paramount importance of making the requested information available in advance of this deadline to ensure that the

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<sup>6</sup> Given the FOIA Requests were clearly Encana's and Encana would have been willing to assure payment, EPA had no basis for insisting on pre-payment.

<sup>7</sup> The February 16, 2012 letter provides no specific information to support EPA's demand for a \$114,360 payment. EPA subsequently provided information on certain "assumptions" but no meaningful justification for the \$114,360 demand. See, e.g., Attachment 8, March 27, 2012 letter from Matthew Cohn, EPA Region 8, to Linnea Brown, TWH.

<sup>8</sup> By this point in time, EPA had not, and still has not, followed through on the commitment of EPA Administrator, Lisa P. Jackson to Governor Matthew H. Mead of Wyoming to provide "written responses to the State's four-page list of questions," which the State had submitted to EPA in December 2011. Attachment 2, January [date illegible], 2012 letter from EPA Administrator Lisa P. Jackson to Governor Matthew H. Mead. Similarly, EPA had not, and still has not, followed through on EPA Region 8 Administrator James B. Martin's commitment to respond to Senator Inhofe's December 6, 2011 request for correspondence between Region 8 and EPA headquarters and between Region 8 and ORD regarding Pavillion Field. Attachment 10, January 19, 2012 letter from Regional Administrator James B. Martin to the Honorable James Inhofe.

public comment process was informed and meaningful.<sup>9</sup> Attachment 11, March 27, 2012 letter from Linnea Brown, TWH to Matthew Cohn, EPA Region 8 and Attachment 12, March 12, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH.

In further correspondence with EPA, this firm reiterated the reasons why a fee waiver was appropriate in this case. See, e.g., Attachment 13, April 30, 2012 letter from Linnea Brown, TWH, to Matthew Cohn, EPA Region 8. The fee waiver request was further summarily denied on May 2, 2012, based solely on the ground that the fee waiver request was untimely. Attachment 14, May 2, 2012, letter from Larry Gottesman, National FOIA Officer to Linnea Brown, TWH. This appeal follows.

The issue presented by this appeal is whether EPA's denial of Encana's fee waiver request is justified under the circumstances of this case because that request was not made at the time Encana initially submitted its FOIA requests. The documents at issue for the fee waiver request and EPA's related \$114,360 payment demand appear to be largely limited to what are denominated in this submittal as the "Category 4 documents" – EPA's internal and external communications related to its Pavillion Field investigations and the Draft Report.<sup>10</sup> EPA apparently is committed to posting on its website, free of charge, the documents in Categories 1-3 that it deems "critical" to the Draft Report.<sup>11</sup> See, e.g., Attachment 8, March 27, 2012 letter

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<sup>9</sup> As of the date of this appeal, now more than two months after Encana's payment, EPA has not provided any Category 4 documents to Encana.

<sup>10</sup> EPA has suggested that documents in Categories 1-3 that EPA deems "critical" to the Draft Report will be made available to the public at no cost to Encana. Attachment 15, March 29, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH.

<sup>11</sup> EPA has not been clear in responding to Encana's inquiries as to whether the \$114,360 demand and payment nonetheless is or is not intended to include the costs of making the Category 1-3 documents publicly available. See e.g., Attachment 7, February 16, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH.

from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH (“... EPA’s commitment to post important technical and scientific documents does not extend to the internal communications sought by Encana” because “[t]hese internal communications are not matters of general public interest ...”).

While EPA’s denial is premised solely on timeliness, this submittal nonetheless first reviews the reasons why a fee waiver in this matter was and is appropriate as a substantive matter, notwithstanding Encana’s commercial status. The submittal then addresses the issue of the timeliness of Encana’s request. The submittal documents that EPA’s denial of the fee waiver request was arbitrary and capricious in all respects, such that EPA’s determination to deny this fee waiver request should be reversed.

## **II. ENCANA’S CONSOLIDATED FOIA REQUEST SATISFIES EPA’S FEE WAIVER CRITERIA.**

The fee waiver regulation, 40 C.F.R. § 2.107(l)(1), provides for fee waivers when:

Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester.

All of the records requested by Encana fit squarely within this public interest fee waiver provision. EPA’s regulations provide specific criteria for evaluating both prongs of this analysis -- whether requested information is in the public interest and whether the requested information is not primarily in the commercial interest of the requester. 40 C.F.R. § 2.107(l).

### **A. Release of the Information Requested by Encana is in the Public Interest.**

As to whether the requested information is in the public interest, EPA’s regulations provide four criteria, starting with:

The subject of the request: whether the subject of the requested records concerns 'the operations or activities of the government.' The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

Id. at 2.107(1)(2)(i). The subject matter of Encana's Consolidated FOIA Request is the Draft Report. The United States government prepared the Draft Report. EPA published notice in the Federal Register of the availability of the Draft Report and of the opportunity for public comment on it. The Draft Report was prepared by employees of EPA, not by third party contractors. Thus, no doubt exists that the subject of Encana's Consolidated FOIA Request directly concerns the operations and activities of the government.

The second public interest criterion is:

The information value of the information to be disclosed: whether the disclosure is 'likely to contribute' to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

Id. at 2.107(1)(2)(ii). Encana's Consolidated FOIA Request seeks information that already has shown to contribute to an understanding of government operations and activities. At the end of January 2012, a single day before a Congressional hearing on the Draft Report at which EPA Region 8 Regional Administrator Jim Martin testified, EPA posted to its public website more than 600 records. EPA obviously considered this information important to an understanding of its work in Pavillion Field or it would not have timed its release as a backdrop to the Congressional hearing. The majority of the information posted had not been in the public



domain before Encana's Consolidated FOIA Request and all of the information posted by EPA was requested in that FOIA request.

This criterion includes consideration of whether the requested information was already in the public domain before its disclosure. Virtually no Category 4 communications, internal to EPA or with third parties, have been made available to the public. Indeed, EPA Regional Administrator Martin was unable to answer Congressman Harris's question about whether EPA had communicated with the Environmental Defense Fund about the Draft Report.

Attachment 16, Excerpt (p. 24) from Transcript of February 1, 2012 House Science Committee Hearing. As another example, EPA has not provided any of the communications between the three external reviewers that EPA privately had review the Draft Report before its release. The public does not have any knowledge about who sought the external reviewers – did they volunteer or did EPA solicit their review? Nowhere in the public domain is any indication of the reviewers comments or questions or of any changes that any of them suggested to EPA.<sup>12</sup>

The third criterion for determining whether the requested information is in the public interest is:

The contribution to an understanding of the subject by the public is likely to result from disclosure: whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual

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<sup>12</sup> What is known about the external reviewers selected by EPA is that they have publicly decried the environmental impacts allegedly associated with hydraulic fracturing applications. Attachment 17, Jackson R, Vengosh A, "Strong evidence that shale drilling is risky," Philadelphia Inquirer (May 10, 2011). Their work has also been roundly criticized. Attachment 18, Davies, RJ (2011) "Methane contamination of drinking water caused by hydraulic fracturing remains unproved" (Letter) 108 Proceedings of the National Academy of Science ("PNAS") 43, E871 (Oct. 25, 2011); Saba T, Orzechowski M (2011) "Lack of data to support a relationship between methane contamination of drinking water wells and hydraulic fracturing" (Letter) 108 PNAS 37, E663 (Sept. 13, 2011); and Schon S (2011) "Hydraulic fracturing not responsible for methane migration" 108 PNAS 37, E664 (Sept. 13, 2011).

understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

40 C.F.R. § 2.107(l)(2)(iii). There has been intense interest across a broad spectrum of the public in the Draft Report and in understanding its underpinnings and supporting information. The Draft Report and the controversies it has engendered has been the subject of 39 articles and editorials in the Casper-Star Tribune. Both The New York Times and The Wall Street Journal have published articles and editorials about the Draft Report and the controversy over EPA's activities in connection with the Draft Report. Dozens of other publications and blogs are covering the story, including Bloomberg, Forbes, Reuters, CBS News (and affiliates), and E2Wire.<sup>13</sup> Over 200 commenters have submitted comments in response to EPA's request for comments. Some of those comments address information EPA has thus far made available in response to Encana's Consolidated FOIA Request and the other requests for disclosure from Congress and other officials. These comments, and other publicly available critiques, raise serious concerns about the integrity of the two wells EPA drilled in Pavillion and the water quality data from those wells and thereby calls into question the very conclusions of the Draft Report. Additionally, the information EPA has and continues to post on its website raises serious quality assurance and quality control concerns across all four phases of EPA's Pavillion Field sampling efforts.<sup>14</sup>

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<sup>13</sup> These articles and editorials are incorporated by reference and are available on-line.

<sup>14</sup> See, e.g., EPA-HQ-ORD-2011-0895, Kelly, Sean, "Comments on EPA Draft Research Report: Investigation of Ground Water Contamination Near Pavillion, Wyoming," (March 8, 2012); See also, S. S. Papadopoulos & Associates, Inc. "Review of U.S. EPA's December 2011 Draft Report: 'Investigation of Ground Water Contamination Near Pavillion, Wyoming'" (April 26, 2012), at ipaa.org, link at May 16, 2012 press release.

Political leaders also have repeatedly demanded disclosure. Senator James Inhofe has emphasized to EPA the importance of the Draft Report to the local residents and region and his concern over the discrepancy between what EPA had been telling the public through press releases and what EPA had told him. Senator Inhofe requested that EPA provide all correspondence between EPA Region 8 and EPA Headquarters regarding Pavillion.

Attachment 19, December 6, 2011 letter from Senator Inhofe to EPA Administrator Jackson. All of those communications are included in the Category 4 documents under Encana's Consolidated FOIA Request. The Governor of Wyoming, Matthew H. Mead, has also requested that EPA release requested information in the context of serving "the interests of Wyoming's people, particularly citizens in the Pavillion area, Wyoming's resources and industries, and the public at large." Attachment 20, December 20, 2011 letter from Governor Mead to EPA Administrator Jackson. Governor Mead also told EPA that EPA's responses to his requests for information (again encompassed within Encana's request) would "clarify information for ... the public." Attachment 21, January 16, 2012 letter from Governor Mead to EPA Administrator Jackson. Then for a third time, Governor Mead asked EPA to "fully release the requested data to the public immediately."

The requester has deep and broad expertise in the subject area, as do consultants working for it. The requester also has both the ability and proven intent to effectively convey information to the public. The requester has provided information to the press and the public in an understandable manner about scientific flaws and variations from accepted scientific methodology in the Draft Report. See, e.g., the following documents available at [encana.com](http://encana.com):

December 12, 2011 press release; December 20, 2011 technical briefing, NewFields, “Critical Review of ATSDR’s Health Consultation: Evaluation of Contaminants in Private Residential Well Water, Pavillion, Wyoming (August 31, 2010),” November 2011. The requester provided public comments on the expertise that should be included on the peer review panel, Attachment 22, February 17, 2012 letter from David Stewart, Encana, Team Lead EHS, North Rockies, to Rebecca Foster, EPA ORD, and on the key issues that the peer review charge should cover. Attachment 23, March 1, 2012 letter from John Schopp, Encana, Vice President, North Rockies Business Unit, to Rebecca Foster, EPA ORD. The requester has also submitted and will continue to submit public comments to EPA, including reports by scientists and technical experts addressing the requested information and its proper interpretation. For example, on April 19, 2012, the requester submitted to EPA, as public comments, expert reports prepared by Robert J. Sterrett, Ph.D., a well-known and respected hydrogeologist, and Mr. Michael J. Mullen, a well drilling and completion expert. EPA-HQ-ORD-2011-0895, Encana Oil & Gas (USA) Inc., “Initial Comments on U.S. Environmental Protection Agency Draft Report, “Investigation of Ground Water Contamination Near Pavillion, Wyoming (December 2011)” (April 18, 2012). Dr. Sterrett’s report is written in language understandable to the public. It states the questions that he was asked to answer and provides both a brief summary of his conclusions and a more complete explanation for his conclusions for each question. Dr. Sterrett’s report also includes illustrative presentations of requested information in a manner to further assist public understanding. Similarly, Mr. Mullen’s report states the specific issue he was asked to address and provides the public with the bases for and his conclusion that neither of EPA’s two wells is a “reliable water quality monitoring well.” Mullen Report at MM-1.

These two reports demonstrate that Encana has already used some of the information sought through Encana's Consolidated FOIA Request to contribute to the public's understanding of the Draft Report. As more of the requested information becomes available, Encana will continue to prepare additional publicly available reports and other documents to effectively convey the requested information to the public.

The fourth and final criterion for evaluating whether the requested information is in the public interest is:

The significance of the contribution to public understanding: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is important enough to be made public.

40 C.F.R. § 2.107(l)(2)(iv). As discussed above in connection with the publicly available reports by Dr. Sterrett and Mr. Mullen provided by Encana, the requested information has already contributed and will continue to contribute significantly to public understanding of EPA's activities.

Another example in this regard relates to the critical matter of taste and odor complaints made by residents. EPA takes the position that the taste and odor complaints triggered the investigation and EPA also bases one of its conclusions in the Draft Report on taste and odor complaints. Before the disclosure of the requested information on taste and odor complaints, the public likely believed, based on the Draft Report, that the complaints were common and broad-based. After disclosure, public understanding changed in light of new knowledge that the taste

and odor complaints were made by only a few individuals, that taste and odor complaints were not made by any other residents with domestic wells, and that EPA located its two groundwater monitoring wells on two of the three complainants' properties. The public also better understood the doubtful nature of EPA's reliance on them as a justification for EPA's investigations or as a basis for EPA's draft conclusions.

Similarly, before the disclosure, EPA asserted that it used EPA-approved analytic methods. However, in documents prepared for and provided by an EPA contractor to EPA documenting 15 of the Standard Operating Procedures used for chemical analysis, the contractor explicitly warned EPA that:

**"THIS IS NOT AN OFFICIAL EPA APPROVED METHOD.** This document has not been through the Agency's peer review process or ORD clearance process."

This requested information provided a sharp contrast between the public's initial understanding which was based on Regional Administrator Martin's testimony to Congress that EPA followed accepted, standard Agency sampling and analysis protocols. Attachment 24, Excerpt (p. 3) from Transcript of February 1, 2012 House Science Committee Hearing. As a direct result of the requested information, the public obtained access to the contractor disclaimer that the methods used were not EPA-approved and thus the requested information substantially contributed to the public's understanding of EPA's activities.

EPA's responses to Encana's Consolidated FOIA Request violate specific EPA requirements that EPA "will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government

is important enough to be made public.” 40 C.F.R. § 2.107(l)(2)(iv). Nonetheless, EPA has made these exact value judgments in its decisions about what it will post publicly and what it will not provide to the public relative to Pavillion Field. For example, as previously noted, EPA has concluded that only certain documents in Category 1-3 are “critical” and that Category 4 internal communications “are not matters of general public interest...” Attachment 8, March 27, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH. Yet, quite obviously, given the controversies engendered by the Draft Report, EPA is in no position to judge what scientific and technical information is “critical,” which presumably is precisely the reason for the prohibition against “value judgments” in the first place. Similarly, internal communications which presumably would address, among other things, some of the data quality issues and the well construction issues identified from the information EPA has made available, might be embarrassing to EPA, but could contribute significantly to the public’s understanding of EPA’s Pavillion Field activities.

**B. The documents sought in Encana’s Consolidated FOIA Request will not benefit Encana’s commercial interests.**

The second prong of the analysis deals with whether the requested information is “not primarily in the commercial interest of the requester.” The first criterion for this prong of the analysis is:

The existence and magnitude of a commercial interest: whether the requester has a commercial interest that would be furthered by the requested disclosure. FOI Offices will consider any commercial interest of the requester (with reference to the definition of ‘commercial use request’ in paragraph (b)(1) of this section, or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

40 C.F.R. § 2.107(l)(3)(i). Encana has not used hydraulic fracturing applications in the Pavillion Field since 2007. EPA has stated repeatedly in writing and verbally that the Draft Report is limited to the specifics of the Pavillion area and should not be used in other contexts. See, e.g., Attachment 16, Excerpt (p. 23) from Transcript of February 1, 2012 House Science Committee Hearing (J. Martin testimony). Natural gas production in the Pavillion Field is not a substantial portion of Encana's production. The vast majority of Encana's gas production in the United States occurs in four other fields. In its public filings, Encana includes Pavillion Field production within "Other." It is not an important component of Encana's operations.

Encana's interest here is not a financial interest. Encana's interest is driven by its commitment to sound science and the sullyng of its reputation with bad science. In fact, the Draft Report was released by EPA as an EPA "approved" document, contrary to clear policy directives. As you know, the Draft Report was released by EPA in early December 2011 with the following statement in it:

This report has been reviewed and approved by the U.S. Environmental Protection Agency's Office of Research and Development.

This statement is inconsistent with the Disclaimer required by OMB Bulletin No. 05-03, "Final Information Quality Bulletin for Peer Review" (Dec. 16, 2004), p. 35, for materials released but not "disseminated." The required disclaimer states:

THIS INFORMATION IS DISTRIBUTED SOLELY FOR THE PURPOSE OF PRE-DISSEMINATION PEER REVIEW UNDER APPLICABLE INFORMATION QUALITY GUIDELINES. IT HAS NOT BEEN FORMALLY DISSEMINATED [BY



EPA]. IT DOES NOT REPRESENT AND SHOULD NOT BE CONSTRUED TO REPRESENT ANY AGENCY DETERMINATION OR POLICY.

Id. Further, contrary to the OMB Bulletin's direction, EPA has not taken any steps to "discourage state, local, international and private organizations from using information" in the Draft Report that is targeted for peer review, all to the detriment of the entire natural gas industry and a fair, informed national discussion, based on sound science, of United States energy policy and energy independence. In sum, Encana's commercial interest is inconsequential.

The second criterion for analyzing whether the requested information is not primarily in the commercial interest of the requester is:

The primary interest in disclosure: whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.' A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. FOI Offices ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

40 C.F.R. § 2.107(l)(3)(ii). The degree of public interest in the requested information is exceptionally large. The public interest in the requested records is demonstrated by the following Pavillion-related events and activities, in addition to the public comments, requests for information and press coverage discussed above:

--February 1, 2012 Congressional Hearing held by the Science Subcommittee of the House Energy Committee at which Regional Administrator Jim Martin testified.

--February 29, 2012 Congressional Hearing before the House Appropriations Committee's Interior and Environmental Panel, at which EPA Administrator Lisa Jackson testified about the Draft Report.

--EPA's March 12, 2012 commitment to "continue to post releasable documents of general interest on EPA's Pavillion website." Attachment 12, March 12, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH.

--EPA's March 27, 2012 statement that EPA has received numerous requests for technical documents from elected officials and industry associations, and EPA "is committed to making these documents available to the public." Attachment 8, March 27, 2012 letter from Matthew Cohn, EPA Region 8 to Linnea Brown, TWH.

--EPA's soliciting public comment on the draft "charge" to be submitted to the peer review panel. See [http://cfpub.epa.gov/si/si\\_public\\_pra\\_view.cfm?dirEntryID=240345](http://cfpub.epa.gov/si/si_public_pra_view.cfm?dirEntryID=240345) (screen shot); and Attachment 23, March 1, 2012 letter from John Schopp, Encana, Vice President, North Rockies Business Unit, to Rebecca Foster, EPA ORD.

--EPA's original and two extensions of its public comment period – the first deadline being January 27, 2012 (77 Fed. Reg. 2292); the next March 12, 2012 (77 Fed. Reg. 3770); and the current deadline of October 16, 2012 (77 Fed. Reg. 19012).

All of these events demonstrate that the public interest in disclosure of this information is significantly "greater in magnitude" to any possible commercial interest, satisfying the second prong of the public interest fee waiver provisions.

In sum, Encana's FOIA request qualifies for a fee waiver. The requested documentation should be made available, in the public interest, free of charge, as provided by 40 C.F.R. § 2.107(l).

### **III. DENIAL OF FEE WAIVER REQUEST**

EPA's fee waiver decision is arbitrary and capricious in light of the unique circumstances associated with Encana's Consolidated FOIA Request, the language and rationale of EPA's regulatory provisions addressing fee waiver requests and the broader purpose of the FOIA.

#### **A. Under the facts, Encana's fee waiver request is timely.**

Encana effectively complied with EPA's FOIA fee waiver requirement by first requesting a fee waiver in its February 8, 2012 letter to EPA. Attachment 9. At this point, three critical facts, each of which is detailed earlier in this appeal, had developed and converged: (1) the extent of the public's interest in this information had reached a critical threshold; (2) EPA was continuing to ignore or equivocate on the requests from Congress and other public officials for a full release of the very information covered by Encana's Consolidated FOIA Request, such that Encana's status had changed from a "commercial requester" to an obvious representative of the public interest; and (3) the scope of Encana's initial FOIA requests, in response to EPA questions and ensuing communications, had become sufficiently clarified and articulated for EPA to consolidate the requests, establish a timeframe for response and demand a patently outrageous sum of money, that no public interest group, and only a large commercial interest, could afford to pay. It was at this point in February that EPA was first in a position, pursuant to its fee waiver regulations and in light of the fee waiver factors, to consider the cost-effectiveness of the

necessary investment of administrative resources, in granting Encana's fee waiver request. 40 C.F.R. § 2.107(l)(5).

Apparently, EPA's position is that to comply with the language that a fee waiver request "must be submitted along with the request," Encana should have withdrawn its FOIA requests in February or thereafter, after months of discussion aimed at consolidating and streamlining the requests, and resubmit those requests with an explicit fee waiver request. Doing so would have wasted the enormous amount of administrative resources that EPA claims to have devoted to processing Encana's FOIA in the December to February timeframe so that a response could be prepared. Plus, as previously noted, it is clearly EPA's position, given subsequent correspondence, that disclosure of Category 4 documents in particular is not, in any event, in the public interest. Therefore, EPA's rejection of the fee waiver request on the pretext that it must to be "submitted along with the request" merely raises an unreasonable technicality that ignores Encana's good faith attempt, under the circumstances, to efficiently comply with the FOIA process.

EPA's interpretation of the timing on a fee waiver request is also not supported by EPA's FOIA regulations read as a whole or as implemented. The regulations explicitly state that a FOIA request includes an implied agreement to pay "up to \$25.00" in fees applicable under 40 C.F.R. § 2.107, or a greater or lesser amount as specified in the request. 40 C.F.R. § 2.102(d). The regulations also state that the EPA office responsible for the request will "ordinarily confirm this agreement [to pay the specific fee amount] in writing." *Id.* Moreover, the section on fees and fee waivers states that "the Agency will notify the requester of the actual or estimated

amount of the fees, *unless the requester has indicated a willingness to pay fees as high as those anticipated.*” 40 C.F.R. § 2.107(e) (emphasis added). In sum, EPA’s FOIA regulations dictate a process of dialogue, notification and confirmation when the amount of applicable fees is undetermined.

Here, Encana’s December 2011 FOIA requests explicitly stated that “should these costs exceed \$250, please contact [Encana’s counsel] prior to proceeding.” See, e.g., Attachment 3, Dec. 12, 2011 FOIA request to Region 8. Then, in the ensuing weeks and months after the initial requests, EPA equivocated and delayed in providing Encana with the amount of fees to be charged. Per the terms of Encana’s initial requests and the language and intent of EPA’s FOIA regulations, during this interim period, the request was in limbo – incomplete, undefined and on hold to the extent that more than \$250 in fees were to be incurred. This interregnum is consistent with and reinforced by EPA’s own regulations which state that “EPA will do no further work on the request until the requester agrees to pay the anticipated total fee.” Id. at §2.107(e). In other words, in a situation like this, EPA’s FOIA regulations explicitly envision the progression in fee discussion that actually occurred in this instance. Encana followed this regulatory framework and should not be penalized through an arbitrary and incoherent interpretation of this framework.

Interpreting compliance in Encana’s favor is further supported by the regulatory history leading to the 2002 amendments of EPA’s FOIA regulations related to public interest FOIA requests. EPA’s amendments were in response to the National Performance Review and certain 1993 and 1999 executive memoranda setting forth principles and goals for revising agency implementation of the FOIA. See 67 Fed. Reg. 67303-01 (November 5, 2002) (Final Rule,

Revised Freedom of Information Act Regulations); 65 Fed. Reg. 19703-01 (April 12, 2000) (Proposed Rule, Revised Freedom of Information Act Regulations). These executive directives stated that the FOIA is to be interpreted and implemented with a “presumption of disclosure” and further cautioned that “[t]he existence of unnecessary bureaucratic hurdles has no place in [FOIA’s] implementation.” See Clinton, W., White House Memorandum, “Freedom of Information Act” (Oct. 4, 1993), and Reno, J., “FOIA Litigation Guidance” (Oct. 4, 1993). Similarly, courts have recognized that the FOIA amendment’s “main purpose was ‘to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.’” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9<sup>th</sup> Cir. 1987) (upholding FOIA fee reduction,) (citing 132 Cong. Rec. S16496 (Oct. 15, 1986)); see also Milner v. Department of the Navy, 131 S. Ct. 1259 (2011) (recognizing the FOIA’s “goal of broad disclosure”).

In this circumstance, Encana’s fee waiver request was timely and EPA’s denial of that request is arbitrary and capricious.

**B. Any delay in submitting Encana’s fee waiver request is excusable and has not prejudiced EPA.**

For the reasons noted above, even if Encana’s fee waiver request was not technically timely, any delay in submitting that request was excusable and non-prejudicial to EPA. See, e.g., Shinseki v. Sanders, 556 U.S. 396, 406-407 (2009) (recognizing that courts reviewing agency action under the Administrative Procedure Act’s scope of review section should take “due account” of the “prejudicial” effect of any action). Application of this principle is all the more appropriate here, in light of the recognized presumption that the FOIA should not be

implemented such that unnecessary “technicalities” preclude fee waivers. McClellan, 835 F.2d at 1284. In this case, EPA’s denial based on the timing of Encana’s fee waiver request is just such an unnecessary technicality. Indeed, as noted above, Encana could surmount this by withdrawing its request, and then re-submitting it anew with a fee waiver request. To avoid these semantics and tactics, and additional agency costs, EPA should decide in favor of Encana on this appeal and address Encana’s request on the merits to find that Encana is entitled to a fee waiver in this instance.

**C. Release, free of charge, of the intra-agency and third party communications covered by Encana’s Consolidated FOIA Request is in the public interest.**

EPA’s Pavillion Field study was initiated in early 2009 and, as previously noted, the Draft Report, was issued in December 2011. So, effectively, Encana’s Consolidated FOIA Request seeks documents and, particularly for purposes of this appeal, communications, covering at most, less than 3 years, and not decades as is the case at many other EPA sites. EPA Region 8 was the sole lead on these efforts until, at some point, ORD became involved. EPA’s focus, ostensibly, has been on developing a rigorous scientific and technical evaluation of what, from a spatial perspective, is a discrete and limited problem, i.e., a small number of palatability complaints in an isolated area of rural Wyoming.

If EPA’s agenda is as stated, few, if any, of the internal communications covered by Encana’s Consolidated FOIA Request should be privileged or otherwise exempt from disclosure, such that a rigorous legal review is required prior to production. As to communications between EPA and third parties, again, if EPA’s agenda is as stated, the documents obviously are not privileged or otherwise immune from disclosure and should be few in number; limited to some

number of communications with Encana (related to EPA's requests for information and access and coordination of field activities), the State of Wyoming, and the individual residents with domestic water palatability concerns.

In these circumstances, that EPA has set the price of disclosure so unjustifiably high is in itself a striking attestation to the importance of these communications to the public's understanding of EPA's operations and activities in Pavillion Field. In fact, the conclusion is almost unavoidable that EPA set the price of disclosure so high in the hope that payment would not be made and the requested communications would not have to be disclosed. Coupled with the many other concerns and issues identified to date in public comments and otherwise about the Draft Report and the data supporting it, EPA's bias in selecting its "external reviewers," and EPA not following OMB guidelines in issuing its report, release of the requested communications free of charge is clearly in the public interest.

Respectfully submitted,  
On behalf of Encana Oil & Gas (USA) Inc.

A handwritten signature in black ink, appearing to read 'E. Temkin', with a long horizontal flourish extending to the right.

Elizabeth H. Temkin  
Linnea Brown